Case No. 84-1763 (1)

Office-Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CASE No. 84-1477
DC No. 83-0348

PAULINE WALBER, etc.

Appellant,

V.

THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary

Appellee.

JURISDICTIONAL STATEMENT

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Dated: April 10, 1985

79pp

STATEMENT OF ISSUES PRESENTED

1. Whether the Law prohibits Discrimination by Federal Government Contractors on the basis of sex and does not proscribe such Discrimination by the Federal Contracting Authorities against Contractors.

2. Whether Claims against the Department of Housing and Urban Development are Claims against the United States under 28 U.S.C. 1346 (a)(2).

3. Whether Claims involving Sex Discrimination are Claims outside the scope of a Government Construction Contract.

4. Whether Claims involving Sex Discrimination are Claims under CDA.

5. Whether the U. S. District Court has Jurisdiction on Claims against the Department of Housing and Urban Development, after Administrative relief has been exhausted.

6. Whether a final Decision and/or Order, regardless if entered by a Contracting Officer, an Administrative Board, including all Federal Courts, shall inform the moving party of his (her) Right to pursue the matter further, indicating time limit and proper Court Procedure, to do so.

7. Whether it justifies to burden Appellant, a

second time, in the Court of Appeals for the Federal Circuit, with Government's Motion to Dismiss, originally filed in the Court of Appeals for the Sixth Circuit.

8. Whether the United States Department of Justice has a Right to defend the Government, against the very same Prohibited Law, that it is supposed to protect the Public against, in this Matter Sex Discrimination.

9. Whether U. S. Courts of Appeals have Jurisdiction on Appeals from Interlocutory Orders, under 28 U.S.C. 1292 (a)(1).

10. Whether the Sixth Circuit erred with its spontaneous Decision indicating that the action in the District Court was based in part on 28 U.S.C. 1346 for the purpose to provide grounds for transferring Appeal to the CAFC.

11. Whether the Sixth Circuit erred with its Order indicating that the action in the District Court is based on 28 U.S.C. 1346, without entering an Opinion and/or having an audio recording made to support the grounds that said Order is based upon.

12. Whether the Sixth Circuit erred by failing to dispose of Appellant's Motion to Stay Order by

District Court - Pending Appeal, received October 26, 1984, prior to entering its Order, November 16, 1984, to transfer Appeal to the CAFC.

13. Whether the Sixth Circuit erred in using 28 U.S.C. 1346 as a basis to Transfer Appeal to the CAFC, which is contrary to the Decision in the District Court, where the Trial Judge had already determined that due to the fact that claims involve Sex Discrimination, the action is not based under 28 U.S.C. 1346.

14. Whether the Sixth Circuit erred in transferring the Appeal to the CAFC, prior to the expiration of the 10 days, as provided with FRCP Rule 62.(A).

15. Whether the U. S. Department of Housing and Urban Development (HUD), a Government Agency, is immune against having to cooperate with Discovery.

16. Whether Brothers Specifications Inc. (Brothers Inc.), under the definition of "Agent", is an Agent for HUD.

17. Whether James Sullivan, President of Brothers Inc., is the proper party to Answer Interrogatories related to the service rendered HUD, involving the seven (7) Contracts, at issue herewith.

18. Whether under the Freedom of Information Act,

Appellant is entitled to examine the Documents in her "Contractor's File", that was used as a basis to rule her as a non-responsible Contractor.

19. Whether HUD had the Right to dispose of Documents involving Contracts in Litigation.

20. Whether HUD had the right to throw away the Specification Books, used on Walk-through, prior to expiration date of the six (6) year period, time limitation to sue, from the dated Contracts were Terminated.

21. Whether Don Snyder, Contracting Officer totally involved with all Contracts at issue herewith, is the proper Officer at HUD, to Answer to Interrogatories by Appellant.

22. Whether the Magistrate was within the Law, by Denying Appellant's Motions for Discovery, with the absence of a Response in Opposition, by HUD.

23. Whether the Magistrate had the Jurisdiction to enter a Defense for HUD, solely invented by the Magistrate.

24. Whether a Magistrate has a duty to conform to the requirements specified in the Order of Reference from the Trial Judge.

24. Whether a Magistrate has the Jurisdiction to

Deny an Order on a Motion, without a Hearing and without notifying all parties that said Motion is Ordered for Submission and Determination without Oral Hearing.

25. Whether a Magistrate is obligated to prepare a report upon matters submitted to him by Order of Reference, which shall include findings of fact and Law.

26. Whether Appellant has a Legal Right to examine Documentation used by HUD, to remove her from all rotation lists, which resulted in total suspension from Participating with all Programs at HUD.

27. Whether the Trial Judge erred in entering an Order of Reference, returning each Objection and/or Appeal made to him by Appellant, involving Orders entered by same Magistrate.

28. Whether the Trial Judge erred with his Order Affirming the Magistrate's Orders Concerning Discovery, with the absence of a transcript and a Response in Opposition from HUD, before him, to Review Appellant's Motions Concerning Discovery.

29. Whether the Trial Judge has the Jurisdiction to force continuation of this matter, pending a Determination by the Appellate Court on his Order,

involving Discovery, that this Appeal is based upon.

30. Whether the Sixth Circuit erred in using 28 U.S.C. 1346 as a basis to Transfer Appeal to the Federal Circuit, which is contrary to the Decision in the District Court, whereby the Trial Judge had already settled this issue, with his Determination that due to the fact that Claims involve Sex Discrimination, is irrelevant to and not based under 28 U.S.C. 1346.

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALBER CONSTRUCTION CO.,

Appellant,

V.

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary

Appellee.

Pauline Walber D/B/A
Walber Construction Co.
Appellant,
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JURISDICTIONAL STATEMENT

COURSE OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

I. Nature of the Case

This is an Appeal from the Order affirming the Magistrate's Orders Concerning Discovery and the Order Denying Appellant's Motion for Reconsideration, entered by the Trial Judge, the Honcrable George E. Woods, a United States Dictraict Court Judge.

This matter involves seven (7) out of thirteen (13) Terminated Contracts, entered into by the Department of Housing and Urban Development and the Appellant, Owner of Walber Construction Co., that were Terminated by HUD.

Claims involved in this matter, by HUD's choice, not Appellant's, were originally before the HUDBCA, and, with the absence of Record File and a Final Decision by the Contracting Officer, were Dismissed by the Board, by lack of Jurisdiction, thereby, based on the fact that Administrative Relief was exhausted, Appellant filed the Complaint, in the United States District Court.

Appellant was the first and only Female Contractor that participated with Programs at HUD for seven (7) years, beginning with 1972 through and including 1979.

All through those years Appellant was constantly burdened by HUD with abuse and Sex Discrimination, for which Appellant, on numerous ocassions, filed Complaints within the Agency, which at times would ease up some, but, for the most were swept under the Carpet.

During 1978 HUD came up with TBR Program, (To be repaired), whereby HUD first sold the property, supposedly, to the Highest Bidder and after advertised the Contract for Repairs, that would be awarded to the Lowest Bidder.

During 1978 Appellant was the successfull Bidder and was awarded twenty seven (27) Contracts, which, excluding Amendments to Contracts, came to a total of $302,909.

Out of these twenty seven (27) Contracts, twenty three (23) were originally on Appeal, referred to by HUD to its own Board of Contract Appeals, conveniently ignoring the fact that under CDA, the Law required HUD to inform Appellant of her Rights

under CDA, which provides that Appellant had the the Right to sue in the United States Claims Court or bring an Appeal to the HUDBCA.

These Appeals involved thirteen (13) Terminated Contracts, some with work well in progress and ten (10) completed Contracts, all of which are based on the abuse and Sex Discrimination that HUD burdened Appellant with.

The thirteen (13) Terminated Contracts, excluding Amendments, came to a total of $166,126, more than 50% of all Contracts awarded.

A Complaint involving four (4) completed Contracts is in the U. S. District Court, under Civil Action No. 83-CV-0454-DT, which is also on Appeal, on subject matter jurisdiction, in the Sixth Circuit, under Case No. 84-1113, presently pending an Appeal, in the Supreme Court of the United States, also involving subject matter jurisdiction.

These four (4) Contracts were before the HUDBCA for more than three (3) years and ended up, after all that time, inbeing Dismissed by lack of Jurisdiction, based on grounds that in no way, could be applied to said Contracts.

HUD controls all Documents essential for

Appellant to carry the burden of proof that the seven (7) Terminated Contracts, at issue in this matter, were Terminated based on Sex Discrimination, which entitles Appellant to compensation for the work and time she devoted to the start-up activities, including up and to, award of Contracts.

During the time that Contracts were in Litigation, HUD claims to have discarded the Documents Appellant Requested, involving Discovery.

Under such circumstances, the next proper procedure, for Discovery would have to be by written Answers to Interrogatories, directed to HUD's Contracting Officer, whose functions are directly related to the Contracts at issue herewith, and, who found it amusing to first award said Contracts, only to be Terminated later, and without due process of Law, had Appellant suspended from participating with HUD Programs, by falsely recommending that Appellant be ruled a non-responsible Contractor.

As will be further indicated herewith, with Documentation in support thereof, the Magistrate erred with his ruling Denying Appellant the Right to Discovery and the Trial Judge erred in affirming the Magistrate's Orders

II. Reference to Reports and Opinions Entered by the Magistrate and the Trial Judge

The Complaint was filed in the United States District Court, January 31, 1983.

All of Appellant's Claims against HUD are based on Sex Discrimination.

If Appellant had filed her Complaint as a Direct Discrimination Claim, she would have included numerous other Claims, such as emotional distress, punitive damages, loss of anticipatory profits, etc.

The fact that Appellant restricted her Claims only to losses incurred, due to Sex Discrimination, involved with Contracts, and, Claims with two (2) of these Contracts, exceed $10,000 with each Contract, does not give grounds to consider the Complaint based in part on 28 U.S.C. 1346.

The abuse and Sex Discrimination that the Government burdened Appellant with, is not within the scope of the Contract, it is not covered by Contract Dispute Clauses and it is not covered by CDA, it is prohibited by Law, and, it violated Appellant's Constitutional Right.

This establishes Jurisdiction of the U. S. District Court, without limitation to amounts Claimed

with each Contract, and is completely irrelevant to 28 U.S.C. 1346.

The fact that there may not be statutes as of yet, to protect the Contractor (Appellant), against Sex Discrimination by Government Contracting Authorities, to have to limit the possible recovery, in order to avoid for this matter to be tossed around between Federal Courts, to find one with proper Jurisdiction, is without Justice.

This matter was originally assigned to the Hon. Ralph B. Guy Jr.

Appellant's letter dated April 28, 1983, addressed to Francis L. Zebot, Assistant United States Attorney, Attorney as of Record for HUD, Subject: Request for Documents, (see Appl. F. A-Exh. #1), was received May 2, 1983.

May 31, 1983, Government filed "Federal Defendant's Response to Request for Documents etc." (DC #8).

It can well be noted:

(a) Item 1. Appellant was deprived of the Record files, referred to by HUDBCA as Rule 4 Files.

(1) The complete Rule 4 Files have Documents that differ with each Contract, essential for Appellant to carry the burden of proof.

(2) The Files presented by Counsel for Appellant to Review, were just a few loose Documents, with perforated holes, which support that they were pulled from Record Files, maintained with file fasteners.

(3) Said files did not have the information sought, which, based on other Rule 4 Files, submitted by HUD to the Board and Appellant, normally are kept in such Record Files.

(b) Item 2. With reference to Cost Price Lists, the statement by Defendant is untruthfull and was misleading the Court.

(c) The Specification Books used on Walk-through, are a major issue with three (3) Contracts, herewith involved, Defendant claims to have "thrown out".

June 20, 1983, Appellant filed "Motion to Show Cause by Government for Withholding Documents Requested, (DC #11, Br. 1-8).

June 27, 1983, the Hon; Ralph B. Guy entered a Notice of Status Report, (DC #13) scheduling the Hearing for July 21, 1983.

Appellant's letter dated July 2, 1983, addressed to Francis L. Zebot, Subject: Request for Production of Documents, (Ap.F. A-Exh. #2), was received by Defendant July 6, 1983, this is fifteen (15) days prior to scheduled Hearing.

July 18, 1983, Appellant filed "Motion for Production of Documents, (DC #16)

August 4, 1983, Government filed "Federal Defendant's Response in Opposition to Plaintiff's

Motion to Show Cause by Government for Withholding Documents Requested", (DC #21).

This postdates the date of the Hearing and is fourty five (45) days from the date of Receipt of Appellant's Motion.

August 11, 1983, Government filed "Federal Defendant's Response to Request for Production of Documents and to Motion for Production of Documents (DC #22).

This also postdates the date of Hearing and is thirty six (36) days from the date of receipt of Appellant's Request for Production of Documents.

With all these, the Government deprived Appellant the opportunity to present the areas of disagreement, to the Trial Judge, the day of the Hearing, but, this can not be considered as granting Latitude to the Government, however, based on the fact that Judge Guy did not have a Court Reporter, during the conference, the Government has it made.

With both Documents, Government Claims that Documents Requested have been destroyed and that it can not produce what "they do not have".

August 22, 1983, Appellant filed "Plaintiff's Response to Government's Opposition to Discovery,

(see DC #23, Br. 1-6 and 11-18).

August 25, 1983, this is three (3) days later, the Hon. Ralph B. Guy entered the "Order Denying Without Prejudice Plaintiff's Motion for Production of Documents" (DC #26) and the "Order Denying Plaintiff's Motion for an Order to Show Cause," (DC #25).

At this point it became obvious that Government was not going to produce the Documents Requested, to provide the information sought, in the District Court, anymore than it did with Appeals, when they were before the HUDBCA, at the beginning of Litigation, at which time Government could not and did not claim that said Documents were not available, it simply did not comply with Orders issued by the Board.

At the next status conference, held November 17, 1983, again without a Court Reporter, the Hon; Ralph B. Guy, pointed out to Appellant, that Discovery can be obtained by means of Interrogatories, and, he scheduled the next status conference for February 21, 1984, and the closing date for Discovery to be March 1, 1984.

November 22, 1983, this is five (5) days after the status conference, Appellant filed "Interrogatories by Plaintiff directed to Robert Brown, Chief

Property Officer at HUD, (DC #33) and same day filed Interrogatories directed to James Sullivan, President of Brothers Inc., an Agent for HUD, (DC #34), and December 12, 1983, Appellant filed Interrogatories directed to Don Snyder.

Don Snyder is the Contracting Officer that awarded Appellant the seven (7) Contracts at issue with this Complaint.

Don Snyder is the C/O that Terminated three (3) of these Contracts and caused two (2) additional Contracts to be Terminated by Therese Dziekan, who worked directly under him and did so upon his Orders.

Pursuant to FRCP Rule 33.(a), Government had thirty (30) days to file Answers to Interrogatories or Objections thereto.

December 22, 1983, Government filed "Objection to Plaintiff's Interrogatories to James Sullivan," (DC #41).

December 27, 1983, Appellant filed "Motion to Compel Government's Answers to Interrogatories by Plaintiff", (DC #46).

Same day an Order was entered to Remove Case from Docket of the Hon. Ralph B. Guy and transfer to the Docket of the Hon. George E. Woods, (DC #45).

January 6, 1984, Government filed Answers to Interrogatories, directed to Robert Brown, (DC #49), this is fourty five (45) days from date of service, of said Interrogatories.

January 16, 1984, the Hon. George E. Woods entered an Order of Reference to U. S. Magistrate, (DC #48), whereby he states:

> "IT IS ORDERED that this matter is referred to United States Magistrate Steven Rhodes for the following purposes:
>
> xxx Hearing and determination (28 U.S.C. Section 636(b)(1)(A) of Motion TO COMPEL GOVERNMENT'S ANSWER TO INTERROGATORIES BY PLTS."

Of all the Orders of Reference referred to the Magistrate, by the Trial Judge, this is the only Order of Reference that the Magistrate followed the purpose intended.

Thereafter, all Motions and Pleadings involving Discovery, like a ball, got tossed around between the Trial Judge, the Hon. George E. Woods and Magistrate Steven Rhodes.

For further information, including dates and Orders, to support this, see AP. F. Br. 10-23.

III. Statement of facts

Pursuant to District Court Local Rule C-3 a. the duties of a Magistrate are to conform to the

requirements specified in the Order of Reference from the Trial Judge.

The Magistrate failed to follow this Rule.

With every Order of Reference to the Magistrate, entered by the Hon. George E. Wood, it is clearly indicated to be for the purpose of "Hearing and Determination".

Involving Discovery, there is a total of six (6) Motions referred to Magistrate Steven Rhodes, with the exception of the first Order of Reference, for the remaining five (5), the Magistrate denied Appellant the Right to be Heard, thereby, there is no Record made of what was before the Magistrate, that can be Appealable to the Appellate Courts, by way of Review.

Pursuant to District Court Local Rule 17 2.j. Oral Hearings on Motions shall be permitted, unless prior to scheduling a Hearing, said Motion is Ordered for Submission and Determination without Oral Hearing to be based on the Briefs, whereby all parties shall so be notified.

The Magistrate failed to follow this Rule.

Pursuant to DC Local Rule 17 2.b., Objections to Interrogatories and Requests for Admission,

shall be in writing.

With the absence of an Objection to Interrogatories directed to Don Snyder, the Magistrate entered Denying Appellant's Motions to Compel HUD to Answer Interrogatories, which became a "Power of Suggestion" and a lead, whereby, the Government filed its Objection after the Orders were entered.

Pursuant to FRCP Rule 53.(a)(1), a Report shall be prepared by the Magistrate upon matters submitted to him by Order of Reference, which shall include findings of fact and Law.

The Magistrate failed to follow this Rule.

With the absence of Copy of Contract, the Magistrate erroneously determined that James Sullivan is not an Agent that Interrogatories can be directed to.

Contrary to Provisions set forth with FRCP Rule 53.(d)(1), it took the Magistrate from February 3, 1984 to March 5, 1984, a total of thirty one (31) days, without a Hearing nor a written Objection from the Government, to erroneously determine that Don Snyder, because he is not a party to this action, does not have to file Answers to Interrogatories.

With the absence of an Objection by the Government and without a Hearing, the Magistrate Denied Appellant's Motion for Order Compelling Discovery by Inspection and Copying of Designated Records, by determining on his own, that the Records Specified have been destroyed.

Government never at any time Claimed that the "Chrono Files" or Appellant's "Contractor's File", to have been destroyed, this was the Magistrate's own invention.

All these is not in accordance sith standard Rules for Court Procedure.

Pursuant to DC Local Rule C-4 b., any party may Object to a Magistrate's proposed findings and recommendations, by Appealing to the Trial Judge for Review.

Said Rule states:

> "A Judge shall make a de novo determination of those portions of the report or specified proposed finding or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record." (emphasis added).

In this matter there was nothing before the

Trial Judge to Review, other than the Magistrate's erroneous Order Denying Appellant's Motions. There was no Record developed by the Magistrate:

(a) The Magistrate did not afford Appellant a Hearing, thereby there was no Transcript before the Trial Judge to Review.

(1) For the only Hearing held February 2, 1984, before the Magistrate, his Order Denying Appellant's Motion, does not state his findings and Recommendations, it merely states:

> "for the reasons stated on the record in open court"

(2) This could never provide a Transcript, for the Trial Judge to Review, within the ten (10) days allowable to file an Objection and/or an Appeal to the Trial Judge, for a Review.

(b) There was no Response and/or Objections, entered by the Government on all other Motions, for the Trial Judge to Review.

In short, there was nothing before the Trial Judge to Review, that would justify his Puling to Affirm the Magistrate's Orders, Granting Immunity to HUD, against having to cooperate with Discovery.

In addition, when an Objection to a Magistrate's Orders are filed, it is for the Trial Judge to Review and determine on the Record Developed before the Magistrate, or, Grant a new Hearing.

In this matter, since there was no Record developed before the Magistrate, involving testimony

or pleadings, by both parties, for the Trial Judge to Review, with every Objection filed by Appellant, the Trial Judge simply entered another Order of Reference, back to the same Magistrate.

Thereby, Appellant's Motions involving Discovery, like a ball, was tossed around, repeatedly, between the Magistrate and the Trial Judge, until the Trial Judge, to bring this game to an end, entered his Order Affirming the Magistrate's Orders, with nothing before him to Review.

This left no recorse for Appellant, other than to bring this matter before the Appellate Court, and again with the absence of Transcripts to Hearings, not afforded Appellant and on most issues even with the absence of a Response and/or Objection filed by HUD.

The Magistrate did it for HUD.

Now same Trial Judge is pressing to bring this matter to Trial, during pendency of the Appeal.

This is not in accordance with Rules of Procedure, when an Appeal is pending before the Appellate Court, from an Order entered by same Trial Judge.

IV. Discovery by means of Interrogatories

Appellant seeks Discovery by means of

Interrogatories directed to Don Snyder, James Sullivan and by Inspection and Copying of Designated Records, for all of which her Motions, were referred by Order of Reference to the Magistrate, and, with dates of Orders Denying Appellant's Motions, as entered by the Magistrate, became so confusing it is to difficult to follow.

Pursuant to FRCP Rule 33.(a) when a Government Agency is a party to an action, Interrogatories can be directed to an Officer and/or its Agent, who shall furnish such information as is available to the party.

For Appellant's Motions involving Interrogatories, the Magistrate, whether by purpose or error, has this provision confused with having to be a party to the action.

All Orders of Reference, referred to the Magistrate, entered by the Trial Judge, indicated to be for the purpose of:

"Hearing and determination (28 U.S.C. Section 636(b)(1)(A) of motion" (emphasis added).

The Magistrate had a unique way of Granting Immunity to HUD against having to cooperate with Discovery, that can well be calculated will lead to admissible evidence to be used by Appellant against HUD.

Every Motion filed by a party, shall have an answer from the adverse party, prior to entering a Ruling on said Motion, with the absence of an Objection, the Motion Denied, whether it is entered by a Trial Judge, Magistrate, Referee, or "who-ever", such action indicates Partiality.

Although it is not contrary to Law to enter a Decision on a Motion without a Hearing, the Law provides that both parties shall be notified that an Order for Submission and Determination of Motion without Oral Hearing, will be entered, thereby, the adverse party is afforded an opportunity to enter a Response and/or Objection, and the moving party has the opportunity to Reply to an Opposition, if it is so indicated.

This provision the Magistrate did not follow.

For all of Appellant's Motions, with the exception of the first one, that the Trial Judge referred to the Magistrate, HUD did not have to enter an Objection, the Magistrate did it for HUD.

This does not indicate an aura of impartiality that every person Granted the authority for settlement or Decision, shall maintain at all times, whether it be the Trial Judge or a Magistrate.

With every Hearing before the HUDBCA, Don Snyder, James Sullivan and Michael Davio, also from Brothers Inc., were Witnesses for HUD, and, it can well be assumed that they also will be Witnesses for HUD at this Trial.

There is no just reason to exempt these men from having to Answer to Interrogatories, prior to being Witnesses for HUD, which based on previous experience, when cross-examined develop a sudden loss of memory, or, to the contrary, can suddenly recognize a Document, to be a Document that HUD wanted it to be, as we know now, and, this is well supported with Documentation in the Record file, truely never existed.

(a) Interrogatories Directed to James Sullivan

FRCP Rule 33.(a) distinctly provides that when a party is a "governmental agency", Interrogatories can be directed to "any officer or agent".

All questions included with Interrogatories directed to James Sullivan, are within the scope of Brothers Inc. duties as an Agent for HUD, for example:

The Specifications that HUD provided for

Appellant to Bid on, with regard to all seven (7) Contracts at issue with this Complaint, were prepared by Brothers Inc., who in that capacity acted as an Agent for HUD.

There is no just reason to grant immunity to James Sullivan against having to file Answers to Interrogatories involving Specification Books.

The Initial Amendment that HUD demanded that Appellant prepare and submit in time for the Walk-through, as a condition with Award of Contracts, was first sent to Brothers Inc., to enter the amount to be allowed for each Item.

In this capacity, Brothers Inc. represents HUD by entering amounts to be allowed on Amendments, which are based on the prevailing Cost Price List, also prepared by Brothers Inc.

Taking in consideration the fact that Robert Brown with his Answers to Interrogatories, admits that Brothers Inc. provided HUD with Cost Price Lists during the period involved with all Contracts at issue with Complaint, and, the fact that Brothers Inc. in a way, dictates to HUD what amounts are to be allowed with Amendments to Contracts, which is based on Cost Price Lists, which for the most involve

Items that Brothers Inc. erroneously omitted from Specs, there is no just reason to Grant immunity to James Sullivan, President, against having to file Answers Interrogatories, involving Cost Price Lists, which is the greater bulk, of all Interrogatories included.

Considering the Contracts that were Terminated due to failure to agree on amounts allowed for Amendments, in a way, also makes Brothers Inc., an unlisted party to this Complaint.

Some of the Interrogatories are with regard to the duties that Brothers Inc., is to perform under their Contract with HUD, the Answers to such questions are also essential.

To review all questions included with Interrogatories directed to James Sullivan, each and every one of them is within the scope of Brothers Inc. activities, involved with being an Agent for HUD and/or an unlisted party to this Complaint.

The provisions set forth with the Contract between HUD and Brothers Inc., are the only means to determine whether Brothers Inc. is a proper Agent that Interrogatories may be directed to.

HUD never produced this Document.

The Magistrate based his Decision on a Contract he has never seen.

To further support that Brothers Inc. is an Agent for HUD and that James Sullivan, its President is the proper party to Answer Interrogatories, see Tr. 2-11 (2-2-84).

(b) Interrogatories Directed To Don Snyder

The original Interrogatories directed to Don Snyder were filed December 12, 1983, Defendant's Answers to said Interrogatories was Docketed March 5, 1984, this is almost three (3) months from date of service upon Defendant.

The Magistrate's Order Denying Appellant's Motion to Compel Defendant to Answer said Interrogatories, on the basis that Don Snyder is not a party to the Complaint, was docketed three days later, March 8, 1984, and the Magistrate failed to later clear this issue, whether his Order stays or is rescinded.

This is what caused confusion and the Government took advantage of this mix-up, which even the Trial Judge never cleared, and without anything before the Trial Judge to Review, he continued erroneously to Affirm the Orders by the Magistrate.

Pursuant to FRCP Rule 33.(a), if the party served is a Governmental Agency, Interrogatories may be directed to any Officer who shall furhish the information available to him.

During the seven (7) years, from 1972 through 1979, that Appellant participated as a General Contractor with Programs at HUD, for the most of that period, Don Snyder was Contracting Officer.

Don Snyder presently is employed by HUD, in the Labor Relations Department, which is a major part of work performed through Contracting Section, whereby, all HUD Records are accessible to him, at all times.

Pursuant to FRCP Rule 26.(a), a party may obtain Discovery by means of Interrogatories, and the frequency of use of this method is not limited.

Pursuant to FRCP Rule 37.(a)(3), evasive Answers to Interrogatories are to be treated as a failure to Answer.

Discovery by means of Interrogatories is not a contest to test the memory of the person that Interrogatories are directed to.

Don Snyder with his Answers to previous Interrogatories, for the most, is evasive and relies on a "maybe"

Don Snyder has access to the information that Appellant seeks, whereby he can furnish same, without relying on his memory, be evasive and/or respond by a possible "maybe".

FRCP Rule 26.(e)(3) states:

> "A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses."

With the Order entered by the Magistrate April 6, 1984 (DC #65), he is in controversy with his own Ruling, by previous Order entered March 5, 1984 (DC #58), including the Order entered by the Hon. George E. Woods, April 9, 1984, (DC #66).

Denying Appellant's Motion to Compel the Government to Answer Revised Interrogatories Directed to Don Snyder, based on Evasive Answers, is clearly erroneous.

The only means that Appellant has to Appeal from an Order entered by the Magistrate, whether brought before the Trial Judge or the Appellate

Courts, can be by Review only.

By not affording Appellant a Hearing, there is no Transcript, thereby the opportunity to prove, in either Court, that said Order was erroneous, is greatly reduced.

This is well supported with the Order entered April 9, 1984, (DC #66), by the Hon. George E. Woods, also without affording Appellant a Hearing, whereby he states:

> "As to the Magistrate's order of March 5, 1984, the Court concludes that the Magistrate's order was neither clearly erroneous nor contrary to law".

Magistrate Rhodes has a unique way of depriving Appellant the Right to Discovery, done neatly, perhaps not contrary to law, but without just cause Granting immunity to the Government against having to cooperate with Discovery.

As it stands now, the Record indicates:

(a) An Order entered by the Hon. George E. Woods Affirming the Magistrate's Orders;

(1) One Order is based on the fact that Don Snyder is "not a party to this action and interrogatories may be served only upon parties to an action". and;

(2) One Order, which post-dates the first one, Denying Appellant's Motion, "because thirty days have not passed since the Interrogatories were filed".

This is hitting Appellant with both ends of the stick.

Which Order is the Trial Judge Affirming?

Don Snyder, in the past, has always been a Witness for HUD, at Hearings before the HUDBCA.

Don Snyder with his previous Answer to Interrogatory No. 25, (DC #57), states:

> "There was only one type of cost price list regularly provided to HUD Contracting"

With this, it is well supported that Don Snyder was untruthful by leading the Administrative Judges at the HUDBCA to believe that Brothers Inc., provided HUD two (2) types of Cost Price Lists, (see App.F. A-Exh. #16) and, was withholding vital information, for the last five (5) years of Litigation with HUD, that Appellant has been trying to prove, that HUD could not produce, to suit its purpose, what never existed.

There is no just cause to deny Appellant the Right to Discovery by means of the revised Interrogatories, directed to Don Snyder, Answers to which, if not evasive, can well be assumed, will provide Appellant the information sought, to prove that Contracts were Terminated due to ill feelings harbored

by Don Snyder against Appellant, based on Sex Discrimination.

V. DISCOVERY BY INSPECTION OF RECORDS

(a) Inspection of "Chrono Files"

All activities by HUD involved with each FHA insured property, acquired by the Government is entered and preserved in the Chrono Files, which can not and never are destroyed regardless of how property was finally disposed, whether by again directly FHA Insured or first sold to an Investor that later becomes again FHA Insured.

Never at any time did HUD Claim to have destroyed the Chrono Files of these Properties, the Magistrate did it for HUD.

By this action the Magistrate leaves an open door for HUD:

(a) There is no way of knowing when and if somebody with proper authority, will Order an Investigation of HUD's disposition of Government acquired property.

(b) For such purpose, the Chrono Files must be available, within reach, at all times.

(c) The Chrono Files for each FHA Insured property, acquired by the Government can never be destroyed.

(d) By HUD not having Claimed that it destroyed the Chrono Files, (the Magistrate did it for HUD), at the proper time and place, HUD is

free to come up with said Files, as needed.

This certainly is a poor system of Justice, to be used as a means to Grant immunity to HUD, against having to cooperate with Discovery.

The Magistrate with his Order, is based on his reasoning that Chrono Files are "terminated three years after closing for disposition of the property from the defendant's inventory".

This reasoning by the Magistrate, for HUD, is false.

The three (3) Chrono files released by HUD to Appellant, in 1981, (before the HUDBCA), well supports Appellant's claim, that in these files HUD maintained Records in a chronological order, that dates back as far as 7 & 8 years, indicating each purchase offer, each sale and resale, involved with that property.

The Government leads the public to believe that the properties it acquired will provide adequate Housing for the Low and Moderate Income families, by assisting them to become Home Owners at a price they can afford.

This is misrepresented to the General Public, the Termination of Appellant's thirteen (13)

Contracts, (with the exception of the Fairmont property), well supports this.

It is Appellant's contention that all Terminated Contracts, with the exception of the Fairmont Property, were Terminated by HUD, in order to sell same to an Investor of their choice, for him to make a profit, whereby, the Purchaser was denied the Right to adequate Housing, at a Price they can afford, as proven with "Brief in Support of Motion to Set Aside Affidavit by Don Snyder", involving the Melrose Contract, (DC #12).

If HUD truly lost the buyers involved with these Terminated Contracts, and, if HUD truly sold these Properties, in accordance with the Rules, as is, to the Highest Bidder, proper Documentation would have to be on Record in the Chrono Files, and, HUD would never destroy that, more so, during Litigation.

HUD claims to have destroyed "case binders".

There is no evidence that such files ever existed, but;

If such files entitled "Case Binders" existed and were destroyed, there would have to be a record as to who, where, when and how such files were destroyed.

The Chrono File is a Record that HUD, not knowing as to when and if the Disposition of each Government acquired property will be Audited, is not in a position to destroy.

The Chrono File, when not in the Department, is safely maintained in the storage space provided HUD, in the McNamara Building.

There is no just cause to Deny Appellant the Right to Discovery, by inspection of Documents, maintained in the Chrono Files.

(b) Inspection of Appellant's "Contractor's File"

Never at any time did HUD claim to have destroyed Appellant's "Contractor's File".

With Order Denying Appellant's Motions, the Magistrate does not make reference to the Request for Inspection of this File, nor did the Government, with its pleadings make reference to this file.

It is not likely that HUD would destroy any evidence against Appellant, if such existed in the Contractor's File, to support its action for suspending Appellant from participating with HUD Programs.

HUD was warned by the Hon: B.Paul Cotter, JR.. Administrative Judge and at one time Chairman of the Board at HUDBCA, that it could be exposing the

Government to liability for Appellant's loss of income, caused with an unlawful suspension and malitious information given to her Insurance Co., that caused Appellant's open line for Surety Bonding, (see Appl. F. A-Exh. #15), to be Terminated.

The Appeal on Contract for the Field Property, involved with said Exhibit, has not been disposed of yet, it has been before the HUDBCA for almost six (6) years, it presently is there, pending a final Decision, and, Appellant has six (6) years from the day that the Decision will be entered, to commence action against HUD for loss of Income.

Based on the Freedom of Information Act, involving said Exhibit, if need be, HUD will have to disclose, Records in Appellant's "Contractor's File".

This puts HUD in no position to destroy any evidence against Appellant, if such existed in her "Contractor's File";

Appellant claims that the Contracts at issue herewith, were Terminated based on the ill feelings that Don Snyder harbored against Appellant, which involved Sex Discrimination, this is well supported with Appl.F. A-Exh. #13.

Appl.F. A-Exh. #14 supports that:

"The determination of non-responsibility was adequately documented by <u>evidence in her file</u>", (emphasis added).

It is essential that Appellant examine this Documentation, that is in "her file", prior to Trial.

By Denying Appellant the Right to examine "her file", HUD is depriving Appellant the Right to Defend herself, against what-ever HUD manufactured Against Appellant, to support the unjustified Termination of these Contracts, which were Terminated Close enough to the date of Snyder's letter, recommending that Appellant be ruled as a non-responsible ontractor, to support that all these, was a one package deal.

There is no just cause for the Courts to Deny Appellant the Right to a proper Defense, whereby her Record can be cleared and Walber Construction Co., may resume its operation, so unjustly interrupted by HUD, clearly based on Sex Discrimination.

(c) Inspection of Contract <u>by HUD with Brothers Inc</u>.

HUD never claimed having destroyed this Document and the Magistrate does not make reference to the Request for Inspection of this Document.

An Inspection of this Document is well in order:

(a) Appl.F. A-Exh. #16 supports that HUD led its HUDBCA to believe that two (2) types of Cost Price Lists, were provided HUD by Brothers Inc.

(b) Answers to Interrogatories by Stephen Brown (DC #49) and Don Snyder (DC #57), a Witness for HUD during the last five (5) years of Litigation, now, for the first time, say that one type of Cost Price List was provided by Brothers Inc.

(c) This controversy can only be settled with the Inspection of Contract.

Proper Cost Price Lists are a major issue with this Complaint, to determine if the Cost Price Lists that HUD did release to Appellant, have a built in 18% to cover overhead and profit that HUD claims a Contractor is entitled for Amendments to Contract.

For all the years, since 1972 that Appellant knows of, including the present, there has never been any Agency other than Brothers Inc., to be the Managing Agent for HUD.

This indicates that HUD simply renewed the Contract with Brothers Inc., each time it expired, rather than putting Contract out for Bidding, to be Awarded, for such purpose, to the Lowest Bidder.

The Contract itself, when renewed, can never be destroyed.

Appellant is interested only in the Portion of Contract, with regard to Service Rendered by Brothers

Inc., that is directly related to the Contracts at issue herewith.

The following is a brief description of some of the services rendered HUD, by Brothers Inc.:

(a) Brothers Inc. provides HUD with Specifications for work needed to Rehabilitate Government acquired Property, used for Contracts to Bid on.

(b) Brothers Inc. Provides HUD with a Cost Price List of current Cost, to insure that HUD does not overpay for work to be performed.

(c) Brothers Inc. provides HUD with a Specification Book for each Contract, with cost included, per Item, to insure that HUD does not accept and award a Contract for an amount excessive as to what they calculated the cost to be and to insure that HUD does not under estimate amounts for Deletions to Contract.

(d) The Initial Amendment Request that HUD demands to be submitted by the Contractor, is first sent to Brothers Inc. to enter amounts to be allowed, for each Item, to insure thac HUD does not overpay, per Item, as requested with Amendment.

(e) Brothers Inc. is first to Inspect each property, upon completion, to insure that each Item is satisfactory repaired.

(f) Brothers Inc. determines for HUD which property is a good prospect to Rehabilitate and which property should be sold "as is" or be demolished.

With all these and there is more, Brothers Inc. is no less an Agent for HUD than an Insurance Agent that provides for a party Insurance to indemnify for a loss incurred.

Government admits with its Objection filed January 23, 1984 (DC #50), that with its various duties, Brothers Inc., "sometimes act as HUD's Agent".

The Document submitted by HUD with Answer to Interrogatories to Stephen Brown (DC #49, is merely a Contract Clause to cover the Scope of Contract, Bid and Award, it is not a copy of the Contract itself, that would reveal the information sought by Appellant, with regard to service rendered, related to the Contracts at issue herewith.

Considering all the facts as presented herewith, there is no just cause to Deny Appellant Inspection of the portions of Contract requested, between HUD and its Agent, Brothers Inc.

VI. DENIAL TO DISCOVERY

The method used by the Magistrate, whereby he completely deprived Appellant the Right to Discovery, was an unjustified means to Grant HUD immunity against having to cooperate with Discovery.

This is a "Repeat Performance" of what was done, when Appellant had her Appeals with the HUDBCA, whereby the Board issued Orders for Production of Documents (see Appl.F. A-Exh. #17), which were completely ignored by HUD, with no after affect, thereby,

it gave the Board the opportunity, later, to Deny Appellant's Claims by stating that "Plaintiff failed to carry the burden of proof".

Appellant's only means to carry the burden of proof, to support that the Contracts at issue in this matter were Terminated in Bad Faith, based on Sex Discrimination, is with Records and Documentation maintained and controlled by HUD.

The Record clearly supports that:

(a) The Magistrate, with his Orders Denying all of Appellant's Motions with regard to Discovery, were entered without an Oral Hearing and with the absence of a Response and/or Objection by HUD, his Decision with each Order, was based purely on his own Determination and Invention of what HUD can not produce, due to destruction of Documents.

(b) The Trial Judge entered his Order Affirming the Magistrate's Orders, without affording Appellant to be Heard and with the absence of anything, before the Court, whereby Appellant's Objections to the Magistrate's Orders, could be determined by Review.

With the absence of the information sought, controlled by the Government, including the Documents that the Magistrate determined, on his own, for the Government, had been destroyed, later Affirmed by the Trial Judge, with nothing before him to Review, there is no way that Appellant can carry the burden of Proof, that the Contracts at issue herewith, were

Terminated in bad faith, based on Sex Discrimination.

This the Trial Judge refuses to accept and continuous to demand that Case should go to Trial, during pendency of the Appeal from his Decision, Affirming the Magistrate's Orders.

Although United States Magistrate Steven M. Rhodes was named by the United States Court of Appeals for the Sixth Circuit to be a Federal Bankrupcy Judge in Detroit, it is clearly indicated that in this matter his Decision was erroneous, by confusing Latitude with Partiality, Granted the Government.

VII. DEMANDS BY TRIAL JUDGE TO PROCEED WITH TRIAL DURING PENDENCY OF APPEAL

The following is a Brief Outline of action by the Trial Judge, forcing this matter to go to Trial during pendency of the Appeal from his Decision affirming the Magistrate's Orders Denying Discovery:

October 17, 1984, fully aware that this Case is not ready for Trial, the Court entered Notice, scheduling Final Pretrial Conference for November 20, 1984, (DC #92).

Although DC Local Rule 17.2.g. provides that a party has ten (10) days to file a Response Opposing

a Motion, it took the Government until November 9, 1984 to Respond Opposing Appellant's Motion to Stay Proceedings Pending Appeal, (DC #93), filed October 22, 1984, this is a total of eighteen (18) days later, and, that was due to the fact that Government got a Reminder from the Court, with its Order for Submission of Motion Without Oral Hearing, extending the time to file an Answer no later than November 9, 1984, (DC #94).

November 15, 1984, the Court entered "Order Denying Plaintiff's Motion to Stay Proceedings Pending Appeal" (DC #97).

With said Order the Court states:

> "IT IS ORDERED that plaintiff's motion be and same is hereby DENIED, it appearing to the Court that, since plaintiff's appeal involves interlocutory and nonappealable orders, no stay of proceedings is required. In reaching this conclusion, the Court repeats defendant's suggestion that plaintiff may test this Court's authority to proceed in this case by seeking a writ of prohibition." Appendix-G.

Based on Appellant's previous experience in Federal Courts, with the Government as a party, there was no need to test the Court's authority, but;

November 19, 1984, Appellant did file in the Court of Appeals for the Sixth Circuit an Application for an Injunction and to Stay Proceedings in the

District Court, Pending Appeal.

Government to support its Opposition in the District Court, same day supposedly, filed in the Court of Appeals for the Sixth Circuit, its Motion to Dismiss by lack of Jurisdiction, claiming that the Appeal is from Interlocutory Orders.

This was clearly an after thought, based on the fact that pursuant to FRAP Rule 31.(a), the Brief of Appellee was due in the Court of Appeals, six (6) days later, November 15, 1984.

Rules of Court Procedure, in Litigation with Government Agencies, were not designed to apply to the Plaintiff only, they shall also be applied to the Government, or, else the Courts are confusing Latitude with Partiality Granted the Government.

Government with its opening statement, included with the Brief, (Ap.F. #6), was giving the Court HUD's version of the Termination of the Contracts at issue herewith, which is completely false.

Government claims that all Orders involving Discovery are Interlocutory. This is not so.

HUD controls all documents essential for Appellant to carry the burden of proof, that all Contracts at issue herewith, were Terminated in bad faith,

based on Sex Discrimination, of which the HUDBCA was well informed, at the very beginning, with Appellant's letter to then Secretary Patricia Harris, involving the first of the thirteen (13) Contracts that HUD Terminated for Appellant, Contract No. 044-78-4548 (Asbury Park) HUDBCA Docket No. 79-421-C40 and repeatedly thereafter, with every Contract before the Board.

Depending as to the information sought with Discovery, is what would determine if the Orders Appealed from are Interlocutory.

This is for the Appellate Courts to determine.

It is Appellant's contention that by the Magistrate and the Trial Judge, without just cause Granting total Immunity to HUD, against having to cooperate with Discovery, the Courts were simply turning back the clock, to a time way back, when the Government had sovereign immunity, and;

To force this matter to go to Trial, with the Court being well informed by Appellant, that without the information sought, an issue that is presently in the Appellate Court, she cannot carry the burden of proof, is clearly (1) a Repeat Performance of action by the HUDBCA, (2) depriving Appellant a fair

Trial and (3) depriving Appellant an Appeal as a Matter of Right.

December 11, 1984 the Pretrial Conference was rescheduled for January 22, 1985.

January 8, 1985, Appellant filed Motion for Continuance of Stay of Proceedings pending Appeal to the Supreme Court of the United States, (DC #100).

Government's Opposition thereto, was filed January 16, 1985.

February 1, 1985 the Court Denied said Motion.

However, at a Hearing held before the Trial Judge, January 29, 1985, the Court considering Appellant's pleading that Case is not ready for Trial, it appeared that the Court was leaning towards Dismissing Complaint without prejudice, but;

In the Court of Appeals for the Federal Circuit, Government's Motion to Dismiss, filed for the second time, is presently pending.

Thereby: (1) should the CAFC Grant Government's Motion to Dismiss, the Appeal will become Moot, (2) should the Trial Judge Dismiss the Complaint, the Appeal will become Moot, (3) should the Trial Judge force matter to go to Trial, the Appeal will become Moot.

This is the general idea, but, certainly a poor system of justice.

COURSE OF PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Notice of Appeal was filed in the District Court July 2, 1984, with copy of same served upon the Government same day.

The Appeal was Docketed in the CASC, July 13, 1984, Government's Motion to Dismiss by Lack of Jurisdiction was filed November 9, 1984, (AF #6).

This is a total of 4 months and 7 days from the date Notice of Appeal was served upon the Government.

Said Motion was untimely, without merit, ignoring and obscuring the true facts. It was clearly an after-thought used by the Government in the District Court to support its belated response in Opposition to Appellant's Motion to Stay Proceedings, pending the Appeal.

Appellant's Response to Government's Motion to Dismiss was filed November 15, 1984 (AF #12).

An Interlocutory Order is when it adjudicates fewer then all Claims and/or it is entered as a temporary decree, made during the course of suit.

In this matter the Orders Appealed from, Denying Discovery, is not a temporary decree that to delay this issue, can be later reviewed and/or altered at the Trial.

Government with its Motion to Dismiss, states:

> "Appellant's Notice of Appeal is from two orders denying discovery (relating to interrogatories). the one also amending scheduling of trial court dates."

This is deliberately obscuring true facts.

The Orders Appealed from are <u>not</u> limited to just "relating to Interrogatories", as previously indicated herewith, they also include Discovery by Inspection of Records, a most important issue.

The Order Appealed from is a Final Determination by the Trial Judge, affirming the Magistrate's Orders, that applies to all seven (7) Terminated Contracts, the information sought by Appellant, (see AF Br.6-23) which without just cause got tossed around between the Magistrate and the Trial Judge, causing an unjustified delay, can not be considered Interlocutory.

November 19, 1984, Appellant filed an Application for an Injunction and to Stay Proceedings in the District Court Pending Appeal. (AF #11).

The following day, November 20, 1984, Appellant as served by Mail the Order dated November 16, 1984, o Transfer Appeal to the CAFC, (Appendix-A).

With said Order the Court states:

"This appeal has been referred to this panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit.

A review of the record indicates that the district court action was based in part on 28 U.S.C. 1346. The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction in an appeal taken from such an action".

Appellant has been on route seeking relief with his action for almost six (6) years. Beginning ith HUDBCA, thus far, all Federal Courts free themelves of this matter by lack of jurisdiction.

It is well indicated, with Documentation in upport thereof, that these Contracts were Terminaed by HUD, on the basis of Sex Discrimination.

This action, in the United States District ourt, was originally assigned to the Hon. Ralph B. uy Jr. a District Court Judge.

May 23, 1983, Government filed "Federal Defendant's Motion to Dismiss or to Grant Summary Judgment".

With said Motion, Government claimed that the ourt lacks subject matter jurisdiction, pursuant to 8 U.S.C. 1346(a)(2), as to claims with two of the

ontracts, (Melrose & Drexel), which exceed
10,000 with each Contract.

Following oral argument on June 22, 1983 and he Court having reviewed the Motion and the briefs iled in support thereof and in opposition thereto, ased on the Sex Discrimination involved, an Order as entered, July 8, 1983, by the Hon. Ralph B. Guy r., Denying Government's Motion for Summary Judgment.

Subject matter jurisdiction under 28 U.S.C. 1346 as no longer an issue in this matter, and, certainly ot before the Sixth Circuit to consider, which was bviously picked up again, for the sole purpose of ransferring Appeal to the Federal Circuit, thereby laiming lack of jurisdiction.

By letter dated November 23, 1984, the Sixth ircuit returned Appellant's Application for an In-unction and to Stay Proceedings in the District ourt Pending Appeal, whereby it states:

> "It appears that this appeal was transferred to the United States Court of Appeals for the Federal Circuit on November 16, 1984.
>
> Consequently, this Court no longer retains jurisdiction in this matter and are therefore returning the aforementioned documents to you unfiled."

This supports that contrary to provisions set

forth with FRCP Rule 62. the Appeal was transferred to the Federal Circuit on the same day it was entered.

November 26, 1984, Appellant filed a Motion for Reconsideration of Order to Transfer Appeal (AF #10)

November 28, 1984, with letter of same date, Appellant resubmitted the Documents previously returned by the Sixth Circuit, stating:

> "Based on the fact that the Trial Judge in the District Court, fully aware that absent the information sought, the issue that this Appeal is based upon, is forcing this matter to go to Trial, during pendency of the Appeal, whereby he has the Final Pretrial Conference scheduled for December 18, 1984, the Application for an Injunction and to Stay Proceedings in the District Court Pending Appeal, is pressing."

This was completely ignored and December 21, 1984, the Court entered the Order Denying Motion for Reconsideration, (Appendix-B) whereby it states:

> "It is ORDERED that the motion for reconsideration and appellant's application for injunction and to stay proceedings in the district court pending appeal be and hereby are denied."

Thereby, contrary to Court Procedure the Appeal remained transferred on the same day the Order to transfer, was entered.

January 2, 1985, with letter attached thereto, pursuant to SC Rule 10.3, Appellant filed the Notice of Appeal, in the Sixth Circuit.

January 17, 1985, the Notice of Appeal was returned to Appellant.

COURSE OF PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pursuant to FRCP Rule 62.(a):

"no execution shall issue upon a Judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry"

But, this was of no benefit for Appellant.

The Order to Transfer the Appeal to the Federal Circuit, was entered in the Sixth Circuit, November 16, 1984, Appendix-A, Records in the Appeal File, including the Docket Sheet, well support that Appeal was transferred to the Federal Circuit, same day the Order was entered.

Obviously provisions set forth with Federal Rules of Civil Procedure, are of no benefit when a Government Agency is a party, if even Federal Appellate Courts are immune to such provisions.

November 26, 1984, same day that Appellant filed Motion for Reconsideration in the Sixth Circuit, she also filed in the Federal Circuit, a Motion to Stay Proceedings.

With Memorandum in Support of Motion to Stay, Appellant states:

"WHEREFORE, Appellant prays that based on the issues set forth with said Motions, this Honorable Court will Stay Proceedings in this matter, pending a Ruling in the Sixth Circuit

Court of Appeals on her Motions for Reconsideration, whereby, it can be determined whether an Appeal to the Supreme Court of the United States is indicated, in order to pursue this matter further".

By all indications the fact that there is an Appeal to the Supreme Court pending, did not effectively Stay Proceedings in the Federal Circuit.

February 4, 1985, Appellant filed "Motion for Continuance of Stay of Proceedings Pending Appeal to the Supreme Court.

February 14, 1985, Government filed its Opposition to said Motion and on same day also filed, "Appellee's Motion to Dismiss Appeal".

With additional time Granted by the Court, March 16, 1985, Appellant filed a Response to Government's Motion to Dismiss Appeal.

Government with its Motion to Dismiss Appeal is clearly attempting to do so, through the back door.

The Original Order entered in the Sixth Circuit on the 16th day of November, 1985, states:

"This appeal has been referred to this panel of the Court pursuant to Rule 9.(a), Rules of the Sixth Circuit.

A review of the record indicates that the district court action was based in part on 28 U.S.C. 1346.

This is the Decision, on Appeal, taken to the

Supreme Court of the United States.

Whether Appeal from the Order entered in the District Court, is Interlocutory, at this point, is irrelevant.

It is for the Supreme Court to first determine if Appellant's Claims against the Department of Housing and Urban Development, totally based on Sex Discrimination, are Claims against the United States under 28 U.S.C. 1346.

Nothing could possibly justify to burden Appellant for the second time on the same issue, settled once before, by the original Trial Judge, in same District Court.

The fact that the Sixth Circuit deprived Appellant the protection of the provision set forth with FRCP Rule 62.(a), whether by purpose or error, does in no way Grant Jurisdiction to the Federal Circuit, to Dismiss Appeal, based on the following:

(a) Within proper time limit, Appellant filed a Motion for Reconsideration of the Court's Order.

(b) Within proper time limit, upon service of Order Denying Appellant's Motion for Reconsideration, the Notice of Appeal to the Supreme Court, was filed in the Sixth Circuit, as provided with SC Rule 10.3.

As indicated herewith, had the Sixth Circuit

followed Rules of Federal Procedure, this Appeal could not and would not have been Transferred to the Federal Circuit.

As of this date, the Federal Circuit has not entered a Decision on Government's Motion to Dismiss.

JURISDICTION

The issue that was before the Sixth Circuit on Appeal was from the Orders entered in the District Court by the Magistrate, later Affirmed by the Trial Judge, the issue as to whether Claims exceeding $10,000 with two (2) of the Contracts, for action to be based in part under 28 U.S.C. 1346, was settled once before in the District Court.

This was not an issue before the Sixth Circuit to consider. It is well indicated that the Court, without entering an opinion and without an audio recording that could be reviewed, determined that the District Court action is based in part on 28 U.S.C. 1346, for the sole purpose, to establish grounds for transfer to the Federal Circuit.

There is no just cause to Grant HUD immunity against having to cooperate with Discovery, by depriving Appellant the Right to the information sought, that Appellant knows are in Records that HUD maintains

in storage, in an area designated for such purpose.

HUD never claimed that the Records that maintain the information sought, had been destroyed, the Magistrate did it for HUD, with the absence of any Response from HUD. Thereby HUD is free to produce these records should an Audit of HUD's disposition of Government acquired property, ever be Ordered.

This is truly confusing Latitude with Partiality Granted HUD, a Government Agency, later affirmed by the Trial Judge.

Now the Sixth Circuit, without entering an opinion and without an audio recording that could be reviewed, determined that the District Court action was based in part on 28 U.S.C. 1346.

These are issues of Law the only the Supreme Court of the United States, has the power and jurisdiction to Grant Appellant the relief sought with the Appeal, which involves Claims based on Sex Discrimination, that Appellant has been on route for almost six (6) years, and, which is being tossed around between Courts, who for one reason or another find grounds to free themselves, by claiming lack of Jurisdiction.

These are grounds on which the Jurisdiction of

he Supreme Court of the United States is invoked.

(i) STATUTORY BASIS FOR FEDERAL JURISDICTION

All Claims against the U. S. Department of Housing and Urban Development, are based on the abuse and Sex Discrimination that Appellant was burdened with.

This is a violation of Appellant's Constitutional Right, which provides that all people are to be treated as equal.

28 U.S.C. 1331, provides that the U. S. District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. 1343(a)(4), provides that the U. S. District Courts shall have original jurisdiction of any civil action, to recover damages or to secure equitable or other relief, under any Act of Congress providing for the protection of Civil Rights.

(ii) ENTRY OF ORDERS SOUGHT TO BE REVIEWED

ORDER entered in the Court of Appeals for the Sixth Circuit, on the 16th day of November, 1984, whereby the Court determined that the District Court action is based in part on 28 U.S.C. 1346 and thereby

Ordered the Appeals to be Transferred to the Court of Appeals for the Federal Circuit, Appendix-A.

Order entered in the Court of Appeals for the Sixth Circuit on the 21st day of December, 1984, Denying Appellant's Motion for Reconsideration, Appendix-B.

Order entered in the District Court, February 2, 1984 by Magistrate Steven W. Rhodes, Denying Plaintiff's Motion to compel Answers to Interrogatories. Order is based on "reasons stated on the record in open court". There was no way a Transcript could have been obtained within the 10 days allowable to have the Magistrate's Order Reviewed by the Trial Judge. Presently there is a Transcript in File. Appendix-C.

See Appendix-L "Order of Reference to United States Magistrate," for the purpose of "Hearing and determination" and see Appendix-M, "Order Requiring Response and Scheduling Hearing". This is a proper way to process a Motion Referred by the Trial Judge to a U. S. Magistrate.

This is the only Motion involving Discovery that the Magistrate processed in proper manner, as provided with Court Rules, thereafter, all other Motions

referred to Magistrate Rhodes, by the Trial Judge, for same purpose, the Magistrate completely ignored the purpose intended and, without a Hearing, with the absence of a Response and/or Opposition by the Government, were Denied by the Magistrate, thereby there was nothing on Record for the Trial Judge to Review, later Affirmed by the Trial Judge, with nothing before the Court to Review.

Order entered in the District Court March 5, 1984 by the Magistrate, Appendix-D, also see Appendix-N, dated February 3, 1984 and Appendix-O, dated February 21, 1984, Order of Reference to United States Magistrate.

Order entered in the District Court, April 6, 1984, by the Magistrate, Appendix-E and corresponding Order of Reference, dated March 28, 1984, Appendix-P.

Order entered in the District Court April 27, 1984 by the Magistrate, Appendix-F, and corresponding Order of Reference, dated April 17, 1984, Appendix-Q.

With this Document the Magistrate refers only to the Inspection of the "chrono files", Appellant's Motion also included Inspection of "Contractor's file and Inspection of "Contract by HUD with Brothers

Inc.", to be limited only to service rendered involved with Contracts at issue herewith (DC #63).

These the Magistrate conveniently and completely ignored, thereby, the Denial for these Discovery, was slipped through the "back door", without a definite Ruling by the Magistrate, later Affirmed by the Trial Judge.

Order entered in the District Court, November 15, 1984, by the Hon. George E. Woods, Denying Plaintiff's Motion to Stay Proceedings Pending Appeal, Appendix-G.

Order entered in the District Court, February 1, 1985, by the Hon. George E. Woods, Denying Plaintiff's Motion for Continuance of Stay of Proceedings Pending Appeal to the Supreme Court of the United States, Appendix-H.

Order entered in the District Court April 9, 1984, by the Hon. George E. Woods, Affirming Magistrate's Orders Concerning Discovery, Appendix-I.

Order entered in the District Court June 20, 1984 by the Hon. George E. Woods, Denying Plaintiff's Motion for Reconsideration, Appendix-J.

(iii) STATUTORY PROVISIONS

28 U.S.C. 1252, provides that a party may Appeal

to the Supreme Court of the United States, from an interlocutory or final Judgment, decree or Order of any Court of the United States in any civil action to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

28 U.S.C. 2072, provides that the Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions.

28 U.S.C. 2076, provides that the Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence.

28 U.S.C. 2106 provides that the Supreme Court may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully braught before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. 2103, provides that if an appeal to the Supreme Court is improvidently taken from a U.

S. Court of Appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

CONSTITUTIONAL PROVISIONS INVOLVED

DISCRIMINATION IS PROHIBITED BY LAW.

Discrimination is prohibited by the Civil Rights Act of 1964 and by Executive Order Number 11246.

Title VII of the Civil Rights Act of 1964, administered by the Equal Employment Opportunity Commission, prohibits Discrimination because of Race Color, Religion, Sex or National Origin.

Executive Order Number 11246, administered by the Office of Federal Contract Compliance, prohibits Discrimination, because of Race, Color, Religion, Sex or National Origin.

Title VI of tne Civil Rights Act of 1964, P.L. 88-352 and the United States Department of Justice Regulations, 28 CFR Part 42, prohibits Discrimination because of Race Color, Religion, Sex or National Origin.

The Fair Labor Standards Act of 1938, as amended, prohibits Discrimination on the basis of Sex.

CFR 1-12.801(b) provides that:

"The regulations of the Secretary of Labor apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government Contracts", (emphasis added).

Provisions set forth with the Equal Employment Opportunity, the Executive Order No. 11246 of September 24, 1965 and the rules and regulations of the Secretary of Labor shall be employed by agencies with respect to Government Contracts and subcontracts.

With respect to Government Contracts and/or Government funded Contracts, the Law requires that Bidders shall be informed of his (her) Rights against Discrimination.

This the U. S. Department of Housing and Urban Development, fails to do, with every Contract put out for Bidding.

STATEMENT OF THE CASE

Appellant was the first Female General Contractor, approved early in 1972, to participate with all Programs at HUD and continued to be the only Female General Contractor, up to and including 1979.

The action in the District Court involves claims

against HUD, totally based on the abuse and Sex Discrimination that Appellant was burdened with.

Claims involving Discrimination are not within the scope of the Contract, they are not subject to Contract Dispute Clauses, they are not governed by CDA and are completely irrelevant to the provisions set forth with Jurisdiction under 28 U.S.C. 1346.

This the Sixth Circuit chose to ignore, thereby it picked up grounds to transfer Appeal to the Federal Circuit.

The Decision by the Sixth Circuit, to consider the action in the District Court to be based in part on 28 U.S.C. 1346 was not entered under a normal appellate practice.

Said Decision was entered by referral to the Motions Panel of three Judges, for disposition, pursuant to Sixth Circuit Rule 9.(a).

There was no such Motion before the Court to consider.

Government's Motion for Summary Judgment, (DC #6) claiming that Appellant's Claims with two (2) Contracts, exceeding $10,000 each, should be under 28 U.S.C. 1346, was settled and Denied in the District Court (DC #15), there was no just cause for the

Sixth Circuit to pick it up again.

Said Decision was entered prior and without oral argument, thereby there is no Transcript for the Supreme Court to Review.

Pursuant to Sixth Circuit Rule 19, when a Case is disposed by an unanimous Decision of each Judge of the Panel, without a written opinion, Appellant would be entitled to a copy of the audio recording of such Decision.

Appellant's request to the Sixth Circuit, for a copy of the audio recording of this Decision, made by Letter dated November 26, 1984, was denied by Telephone, indicating that there was no audio recording made of these Decision.

Accordingly, based on the fact that there is no Opinion by the Court, no audio recording of the Decision by the Panel and no Transcript, there is nothing for the Supreme Court to Review, its Decision would have to be by Direct Appeal.

In the Sixth Circuit, Government's Motion to Dismiss, claiming that the Appeal is from Interlocutory Orders and Appellant's Response thereto, was never Decided by the Court.

By the Sixth Circuit Transferring Appeal on the

same day the Order was entered which is contrary to FRCP Rule 62.(a), the responsibility on this issue was passed on to the Federal Circuit.

In the Federal Circuit Government filed, for the second time a new Motion to Dismiss, again claiming that the Appeal is from Interlocutory Orders.

Appellant's timely Response to said Motion was filed March 16, 1985, whereby Appellant claims that the Federal Circuit does not have the Jurisdiction to Rule on said Motion, based on the fact that Case was Transferred contrary to Court Rules and Appellant did file, within proper time limit, a Motion for Reconsideration and ultimately an Appeal to the Supreme Court.

A Decision on said Motion remains pending.

REASON FOR APPEAL

The Decision in the Sixth Circuit, indicating that Appeal is based in part on 28 U.S.C. 1346 is erroneous, if the Trial Judge had considered this action to be so, when Government had its Motion in the District Court, Appellant would have had the opportunity to waive amounts in access of $10,000 with each of the two (2) Contracts, thereby, the Appeal would have been within the Jurisdiction of the Sixth Circuit.

Claims agains HUD a Government Agency, based on Discrimination, are totally irrelevant to 28 U.S.C, 1346, such claims are under the Jurisdiction of the District Court, without a limit to the amounts claimed.

It is well indicated that the Decision by the Sixth Circuit to the contrary, was purely for the purpose to pass it on to the Federal Circuit, and, thereby also setting a precedent, whereby, all of Appellant's Claims against HUD, with amounts exceeding $10,000 for each Contract, will have to be waived in order to be within the Jurisdiction of the District Court, where Discrimination Claims rightfully belong.

This is without just cause and a poor System of Justice, and;

The manner in which the Magistrate processed all Motions involving Discovery, later erroneously Affirmed by the Trial Judge, is truely confusing Latitude with the Partiality Granted HUD.

HUD is not entitled to immunity against having to cooperate with Discovery, that is well calculated will provide admissible evidence, for Appellant to carry the burden of proof, that all Contracts at issue herewith, were Terminated in bad faith, based on Sex Discrimination.

GOVERNMENT'S USE OF THE DEPARTMENT OF JUSTICE FOR ITS DEFENSE

The United States Department of Justice Regulations 28 C.F.R. Part 42 issued pursuant to Title VI of the Civil Rights Act of 1964, P.L. 88-352, is a protection for the Public, it Prohibits Discrimination and is there to insure that all people shall be treated as equal.

But, when the United States Government is accused of Discrimination, same United States Department of Justice Defends the Government.

This is without Justice and making a mockery of the Federal Court's system.

For the two (2) Cases that Appellant had in the U. S. Claims Court, the U.S. Department of Justice assigned George M. Beasley III to be Government Counsel and, for this matter, in the Sixth Circuit, the U.S. Department of Justice also assigned same George M. Beasley III, to be Government Counsel.

In addition, for this matter, now transferred to the Federal Circuit, in said Court, same George M. Beasley, III, filed an "Entry of Appearance".

It makes common sense for the U.S. Department of Justice to have a Commercial Litigation Branch to

protect the Government and the General Public, but, for the same U. S. Department of Justice to defend the Government against the very same prohibited Law, that it is supposed to protect the Public against, certainly is unjustified.

In the Interest of Justice, this can not be done:

(a) The U.S. Department of Justice can not properly weigh Justice, if on one hand it is to protect Appellant against Discrimination, and, on the other hand, at the same time, in the same matter, it is protecting the Government against accusation and Claims involving same Discrimination..

(b) The U.S. Appellate Courts can not properly weigh Justice, if on one hand they shall abide by rules of the U.S. Department of Justice, with provisions set up to protect the public, Appellant) and, on the other hand they have before them, same U.S. Department of Justice on the Defense side, for the Government.

Some where along the line, "sovereign immunity" must end some place, or else, involving Appellant's Claims against the Government based on Discrimination, Federal Courts are turning back the clock, in order to Grant HUD "sovereign immunity".

Appellant argues that, some where along the line, she is also entitled to protection by the U.S. Department of Justice, to insure that her Constitutional Rights are not Violated, even by the Government.

RESOLUTION

WHEREFORE, Appellant prays that for all the

reasons set forth herewith, including the Brief of the Appellant with Exhibits in support thereof, filed in the U. S. Court of Appeals for the Sixth Circuit, the Supreme Court of the United States, will accept this Appeal as a Direct Appeal, and, (1) Determine the issues presented with the Brief, (2) Determine the issues presented herewith, (3) Reverse the spontaneous Decision entered in the Sixth Circuit, (4) Rule in her favor supporting that her Claims against HUD, based on the abuse and Sex Discrimination that Appellant was so unjustly burdened with, <u>are not</u> Claims against the United States under 28 U.S.C. 1346, (5) Grant such relief as is necessary, in good conscience.

Respectfully submitted,

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Dated: April 10, 1985

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CASC No. 84-1477
DC No. 83-0348

WALBER CONSTRUCTION CO.,

Appellant,

V.

THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of April, 1985, served a true and correct copy of the JURISDICTIONAL STATEMENT and APPENDIX FOR APPELLANT, on the U.S. Court of Appeals for the Sixth Circuit, by enclosing same in a sealed envelope with postage prepaid for First Class Mail, addressed to: 502 U.S. Post Office and Courthouse Building, Cincinnati, Ohio 45202

Pauline Walber

Subscribed and sworn to before me on this 16th day of April, 1985.

Aleen Tutt

ALEEN TUTT
Notary Public, Wayne County, MI
My Commission Expires April 21, 1985

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

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SAMUEL PIERCE, Secretary,
Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of April, 1985, served a true and correct copy of the JURISDICTIONAL STATEMENT and APPENDIX FOR APPELLANT, on Francis L. Zebot, Assistant U. S. Attorney, Counsel for the Government, by enclosing same in a sealed envelope with postage prepaid for First Class Mail, addressed to: 817 Federal Building, 231 W. Lafayette Detroit, Michigan 48226.

Subscriped and sworn to before me on this 16th day of April, 1985
Aleen Tutt

ALEEN TUTT
Notary Public, Wayne County, MI
My Commission Expires April 23, 1985

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